IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 12.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.530 of 1992

1. Sambandan
2. Kandaswami
3. Muthukumaraswami
4. Saravanan .. Appellants/Defendants

vs.

1. Smt. Kunjammal(died)
2. P.R.Chandran
3. P.R.Sundaresan
4. P.R.Jayaraman
5. R.C.Charumathi
6. G.Vijaya
7. S.Chitra
8. R.Lalitha
9. G.Sekar
10. G.Uma

(RR 2 to 10 brought on record as LRs of the deceased sole respondent vide order of this Court dated 20.6.06 made in CMP.No.20896 to 20898 of 2001) .. Respondents/Plaintiffs

Prayer: This Appeal has been filed under Section 96 and Ar 41 Rule 1 C.P.C. against the decree and judgment passed in O.S.No.2539/1981 on the file of the IV Additional Judge, City Civil Court, Chennai, Dated 31.12.1991.

For Appellants : Mr. B.Ravi for Mrs. Hema Sampath

For Respondents : Mr. R.Krishnasamy, senior counsel for Mr. C. Ramesh

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JUDGMENT

This appeal has been preferred against the decree and judgment passed in O.S.No.2539/1981 on the file of the IV Additional Judge, City Civil Court, Chennai.

2. The plaintiff is the respondent herein. The plaintiff has filed the suit for recovery of possession and also for recovery of Rs.12,600/- towards past mean profits and also for future mean profits at the rate of Rs.350/- per month. According to the plaintiff, the plaint schedule property originally belonged to the first defendant. The first defendant, her husband-second defendant along with defendants 3 to 5 have executed a mortgage deed on 28.10.1963 in favour of Sasvatha Ratchaga Nithy, Nungampakkam for a loan of Rs.25,000/-. As per the terms and conditions of the said mortgage deed, in case of default in repayment of the loan amount, as per section 69 of the Transfer of Property Act, the mortgagee his entitled to bring the mortgaged property in public auction to realize the mortgage loan amount. The defendants subsequently obtained a loan of Rs.10,000/- on 20.5.1971 from Baluseri Funds and executed another mortgage deed in respect of the Plaint schedule property. Subsequently on 30.12.1972 the defendants have executed another mortgage deed for Rs.5,000/- in favour of one Radhakrishnan in respect of the same Plaint schedule property. Since the defendants have failed to repay the mortgage amount to Sasvatha Ratchaga Nithy, Nungampakkam, they have brought the suit property in public auction and on 05.02.1972 the plaintiff had taken the said property in public auction for Rs.37,900/- and the plaintiff paid the entire sale amount on 15.07.1975 and obtained the sale deed. So from that date onwards the plaintiff is entitled to get recovery of possession from him. The defendants filed O.S.No.1470/1972 for declaration that the auction which took place on 5.2.1972 is null and void. The said suit was dismissed on 25.8.1978. Even though the auction was conducted on 5.2.1972 due to the suit viz. O.S.No.1470/1972 filed by the first defendant, there was a delay in registration of the sale deed which took place only on 15.7.1975. The plaintiff had issued suit notice on 20.3.1979 to the defendants for recovery of possession and he also claimed mean profits at the rate of Rs.3,500/- per month. The plaintiff restricts his claim for mesne profits to three years prior to the filing of the suit.

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3. The defendants 2 to 5 have adopted the written statement filed by the first defendant which runs as follows:

These defendants have executed the Plaint mentioned mortgage deeds. As per Section 69 of the Transfer of Property Act, the auction was not conducted in proper manner. There was no proper auction notice given before the auction. The first mortgagee and the third mortgagee have jointly taken the suit property in auction in the name of the plaintiff, who is none other than the wife of the third mortgagee. Hence the above said auction is not maintainable. Radhakrishnan has given Rs.10,000/- to the first mortgagee towards his mortgage by way of cheque. The said Radhakrishnan had made arrangements to stop payment to the about said cheque which necessitated the auction. Hence the suit is liable to be dismissed. The first defendant had filed an additional written statement containing that the auction sale in favour of the wife of mortgagee-Radhakirshnan is not valid under law. The second defendant in his written statement would contend that the auction was not conducted as per the Rules. 25% of the bid amount was not deposited on the date of auction itself. The balance amount was also not paid within fifteen days. But the sale deed was executed only on 15.07.1975. As per the sale deed dated 15.07.1975 three years time was granted for the plaintiff to pay the sale consideration. But the said Sasvath Ratchaga Nithy, Nungampakkam has no right to do so. Hence, the public auction is not legally valid. Even though it is stated that the property was sold in the public auction for Rs.37,900/-, the registration charge has been shown as Rs.1,00,000/-. The first Defendant died during January-1977. This fact was known to the plaintiff even at the time of second Appeal. Hence, the suit is liable to be dismissed.

4. The plaintiff in his reply statement has denied all the averments made in the written statement of the Defendants.

5. On the above pleadings the learned trial Judge has framed four issues and one additional issue and after critically analyzing oral and documentary evidence has come to a definite conclusion that the plaintiff is entitled to get delivery of possession granting six months time and relegated the question of mean profits to a separate proceedings under Order 20 Rule 12 of CPC.

6. Aggrieved by the findings of the learned trial judge, the Defendants have preferred this Appeal?

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7. Now the point for determination in this Appeal is whether the public auction conducted in respect of the plaint schedule property on 5.2.1972 is binding on the appellants who are the mortgagers of the plaint schedule property?

8.The point:-

8(a) The learned counsel appearing for the appellant would contend that the plaintiff has impleaded only four LRs in the suit leaving behind three other LRs of Sarojiniammal, and hence the suit is bad for non-joinder of necessary parties. The learned counsel appearing for the respondents would contend that there was absolutely no pleading by the Defendants before the trial Court to the effect that the suit is bad for non-joinder of necessary parties. The learned counsel would contend that even in the additional written statement filed by the Defendants before the trial Court on 09.07.1979 there was no specific plea by the Defendants to the effect that the suit is bad for non-joinder of necessary parties. The second Defendant in his additional written statement dated 22.11.1991 at paragraph 3 would state that even in the S.A.No.2136/81 preferred against the Decree and Judgment passed in O.S.No.1470/72 all the LRs of the deceased/first Defendant have been brought on record and would contend that the suit as against the first Defendant, who is the mortgagor and the owner of the property has been abated. Except this pleading there is absolutely no pleading neither in the written statement nor in the additional written statement filed by the Defendants contending that the suit is bad for non-joinder of necessary parties.

8(b) Order 1 Rule 9 of CPC emphasizes that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Provided that nothing in this rule shall apply to non-joinder of a necessary party.

8(c) The learned counsel appearing for the respondents would focus the attention of this Court to Order 1 Rule 13 of CPC and contend that all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and failure to raise such objections at the earliest point of time will amount to waiver of the such objections. Order 1 Rule 13 of CPC runs as follows:

> "All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity

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and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have ben waived."

In support of his contention the learned counsel relied on the ratio of this Court reported in 1992 TNLJ 154 (Pe.Ramasamy Thevar vs. Perumal Thevar and 7 others), wherein the effect of absence of a plea in respect of misjoinder of parties and cause of action has been dealt with. The relevant observation in the above said dictum runs as follows:

"However, as it has been rightly contended by the learned counsel for the respondents, there are no averments in the written statement regarding the mis-joinder of parties and cause of action. When the issues were settled on 6.7.1978 no issue was framed on mis-joinder of parties. But on 6.11.1979 the trial Court framed an additional issue on misjoinder of parties and the Judgment was pronounced on 7.11.1979. After arguments were over, the additional issues were framed suo-moto by the trial Court. The respondents-plaintiffs were not put on notice of the framing of these issues. The Judgment of the trial Court does not indicate that any arguments were advanced by the parties on this aspect. A reading of the provisions under Order 1 Rule 1, 9, 13 CPC., and order 2 Rule 7 CPC, would make it clear that in the absence of any plea in the written statement on the misjoinder of parties and misjoinder of cause of action, the trial Court was not within its limits in framing issues on this aspect and of its own accord and non-suiting the plaintiffs on the ground of misjoinder of parties.

The same position has been reiterated by this Court in 1999(III) CTC 57 (Visalakshi Achi, RM.AL (died) Vs. RM.Seenivasan), while discussing the effect of non-joinder of parties the Court has held as follows:

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"There is no reference whatsoever to the non-joinder of Amirthavalli Achi. Under Order 8, Rule 2 of the Code of Civil Procedure, it is incumbent on the contesting Defendants to raise all matters which show the suit to be not maintainable. A mere vague statement that the suit is not

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maintainable for non-joinder of necessary parties does not tantamount to taking up a specific plea that a particular necessary party had not been added as a party for which the suit should go. As alredy adverted to, there is no specific plea in the written statements that non-joinder of Amirthavalli Achi was fatal to the case. The only reference to any party in the written statements on the question of non-jonder is to Lakshmanan Chettiar. By no stretch of imagination can it be contended that a mere averment in the written statements without being specific that the suit is bad for non-joinder of party, by itself is sufficient.

In this connection, the learned counsel Mr.R.Subramanian relied on the following decision:

In Meghavaranam Vs. Md.Mohideen Sahib, AIR 1936 Mad. 732 it has been held that,

> "If the Defendants wish to object to a suit on the ground of non-joinder of parties, it is incumbent upon them to state who are the parties that should have been joined and what is the nature of their interest in the suit and that it is not incumbent on the plaintiffs to make researches to discover the identity of supplemental Defendants who were not necessary at any rate until the Defendants raising the objections, had given such information as would enable the plaintiffs to implead them and further that it is not necessary for the plaintiffs to take the trouble themselves by serving interrogatories upon the Defendants to ascertain the names of possible supplemental Defendants".

In Tarapada Mandal Vs. Hajia Khatum Bibi, AIR 1956 Cal. 625 it has been held that,

> "where a written statement merely rests content with the statement that the suit is bad for defect of parties without giving any reason as to why it is bad for defect of parties and the point is not specifically raised therein, the defect, if any, on this

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ground should not be allowed to defeat the whole suit."

In Laxmishnkar Hrishankar Bhatt Vs Yashram Vasta (dead) by L.Rs. AIR 1993 SC 1587 : 1993 (3) SCC 49 it has been held by the Supreme Court that,

"a vague statement that there were other co-owners without anything further could hardly be sufficient to non-suit a party on the ground of non-joinder of parties"

In Lakhi Prasad Togla Vs. Murlidhar Narwari and others, AIR 1973 Pt. 250 it has been held that,

"all objections on the ground of non-joinder or mis-joinder of parties should be taken at the earliest opportunity or a t least at the time of settlement of issues or before such settlement and in the absence of such objection raised at the earliest opportunity, it must be deemed that the non-joinder of party had been waived."

To the identical effect is though the decision of the same High Court in Ramsurat Devi Vs. Satraji Kuer, AIR 1975 Pat. 168. It has been further held in that case that a plea not raised in pleadings cannot be cured by evidence. "

8(d) The other ratio relied on by the learned counsel for the respondents is 1992 MLJ 188 (Ramachandra and others Vs. Valliammal and others) Wherein it has been held that if a co-owner fails to raise a specific plea as to the existence of co-owners at the time of filing the suit cannot maintain action in ejectment because the other co-owners shall be construed only as trespassers. The exact observation in the above said dictum runs as follows:

"Hence, the decision of the Supreme Court in Kanakarathinammal's case, AIR 1965 SC 271, will not apply to the facts of the present case. As pointed out by me already, in the case before the Supreme Court, the plea was raised even at the earliest stage in the written statements. The plea of non-joinder was considered by all the courts. In fact, the trial Court held tht the suit was bad for non-joinder of necessary parties. That was upheld by the appellate Court. The Supreme Court

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held that for consideration of the appellant's claim under the Mysore Hindu Law Women's Rights Act, 1933 as the exclusive heir to her mother, her brothers were necessary parties and in the absence of necessary parties, the suit could not be maintained.

In the present case, no such question will arise. No doubt, the first plaintiff claimed that she was the exclusive heir of her mother Muthial ammal. But even assuming that she was not the exclusive heir, she would only a co-owner along with her brother or brothers vis-a-vis the Defendants, who are only in the position of trespassers. The suit by one co-owner can certainly be maintained for ejecting them and recovering possession. The suit for recovery of possession was only for the benefit of all co-owners in the event of there being other co-owners."

8(e) The appellants were estopped to contend that the auction sale was not properly conducted, in view of Ex.A.4-judgement. The original mortgager Sorojiniammal, who is the first Defendant in O.S.No.2539/1981, had filed O.S.No.1470/1992 on the file of the City Civil Court, Chennai for declaration that the public auction dated 5.2.1972, which was conducted as per section 69 of the Transfer of Property Act by the mortgagee to realize the mortgaged money of Rs.25,000/- under a mortgage deed dated 28.10.1963 was not valid. In that suit Sorajiniammal and all her heirs were brought on record in the Second Appeal.

8(f) After going through the rival contention, this Court in Second Appeal held that the public auction conducted as per section 69 of the Transfer of Property Act in respect of the earlier mortgage executed by Sarojiniammal and her five legal representatives who are the appellants herein is valid and it has been held that Sarojiniammal cannot maintain a suit and accordingly, the Second Appeal was dismissed with costs. Ex.A.4 is a deathknell for the claim of the appellants. In this case mortgagee had executed the sale deed in favour of the plaintiff as per the Court auction on 15.07.1975 under Ex.A.1. The sale is not hit by 'lis pendens' and after the execution of Ex.A.1-Sale deed the right of redemption of the appellant has been extinguished. For this proposition of law, the learned counsel appearing for the respondent relied on 2005 (10) Supreme Court Cases 166 (Madurambigai Ammal & Another Vs. D.Somasundaram & others). The facts in that case in brief are s follows:

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"Respondents 1 to 7 filed a suit for delivery of possession of mortgaged proeprty. The mortgage was executed on 30.11.1974. There were two subsequent mortgages, one on 15.07.1975 and second on 18.12.1975. After due notice to the mortgagors, the 13th Defendant of the suit brought the suit property on public auction after sufficient advertisements published in the newspapers and the auction was held on 31.8.1981. The plaintiffs in the suit were the highest bidders in the auction. They paid the entire amount and sought for execution of sale deed of the mortgaged property. The present appellants filed a suit for redemption on 1.10.1981. Originally, the plaint was filed in the form of an application as an indigent person and later it was converted into suit. Based on the sale deed suit for possession was filed by Respondents 2 to 7 on 10.9.1984. The present appellants contended that by virtue of the suit filed on 1.10.1981, the right of redemption survived and it was not affected by the sale held on 31.8.1981. This contention was rejected and suit for possession filed by Respondents 2 to 7 was decreed. Against the same OSA was filed and by the impugned Judgment the plea raised by the appellants was rejected.

It was contended on behalf of the appellants though the right of the mortgagors to redeem could be extinguished only after the sale deed is executed and as the sale deed was executed subsequent to the suit, the appellants' right of redemption is not lost. It is argued that the appellants had filed a suit for redemption prior to the execution of sale deed, the right of redemption would survive and the appellants relied on second proviso to Section 60 of the Transfer of Property Act, 1882. But we do not find any force in this contention. The proviso specifically says that the right of redemption conferred on the mortgagor under Section 60 could be extinguished by the act of parties or by decree of the Court. The sale deed was executed in favour of the auction-purchaser on 10.11.1981 and the appellants in their suit for redemption had not obtained any interim order staying the operation of the

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auction-sale or the execution of any sale deed and in the absence of (sic thereof) such right of redemption would be extinguished."

The facts of the above dictum squarely applies to the present facts of the case. Here also after the execution of Ex.A.1-Sale deed in favour of the plaintiff by the mortgagee the present appellants have no right to redeem to property because their right have already been extinguished.

8(g) The same proposition of law has been emphasized in 1977 (3) Supreme Court Cases 247 (Narandas Karsondas Vs. S.A.Kamtham & another). The relevant observation in the said dictum runs as follows:

"Section 69 of the Transfer of Property Court deals with mortgagees' power of sale. Under the said Section 69(1)(c), a mortgagee has power of sale without the intervention of the Court where power is conferred by the mortgage deed and the mortgaged property or any part thereof was on the date of the execution of the mortgaged deed, situate within the towns of Calcutta, Madras, Bombay or in any other town or area which the State government, may, by notification in the official Gazette, specify.

The principal question in this appeal is whether the right to redemption has been extinguished by any act of the parties. The English decisions are based on the provisions of the Law of Property Act, 1925. In England sale is effected by the contract of sale, and in India an agreement for sale is not a sale or transfer of interest. In England, mortgagee gets an equitable interest in the property. Under the English doctrine contract of sale transfers an equitable estate to the purchaser. The Court does not assist the mortgagor by granting him a remedy unless there is collusion on the part of the mortgagee.

In India there is no equity or right in property created in favour of the purchaser by the contract between the mortgagee and the proposed purchaser. In India, there is no distinction between legal and equitable estates. The law of India knows nothing of that distinction between legal and equitable property in the sense in which it was understood when equity was administered by the court of chancery in England. Under the Indian law, there can be

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but one owner that is, the legal owner. See Rani Chhatra Kumari Devi Vs. Mohan Bkiram Shah (AIR 1931 PC 196).

.....

The right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless in has been extinguished by the act of parties. The combined effect of Section 54 of the Transfer of Property Act and Section 17 of the Indian Registration Act is that a contract for sale in respect of immoveable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further Section 69(3) of the Trnsfer of Property Court shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shll not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption.

So at no stretch of imagination it cannot be said that the appellant and his LRs can redeem the mortgaged property. After the execution of Ex.A.1-sale deed, in pursuance of the the public auction by the mortgagee, and after the execution of Ex.A.1-Sale deed, mortgagor cannot ask for redemption of the mortgaged

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property. The possession of the appellants are only to that of a trespassers and the findings of the learned trial Judge that the plaintiff is entitled to recovery of possession, needs no interference from this Court. Under such circumstances, I hold on the point that the public auction conducted in respect of the plaint schedule property under Section 69 of the Transfer of Property Act will bind the appellants who are the mortgagors.

9. In the result, the appeal is dismissed confirming the decree and Judgment passed in O.S.No. 2539/1981 on the file of the IV Additional Judge, City Civil Court, Chennai. No costs.

ssv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,
The IV Additional Judge,
City Civil Court,
Chennai.

+ one cc to Mrs. Hema Sampath, Advocate sr no. 48049
+ one cc to Mr. C. Ramesh, Advocate sr no. 47828

RNA(CO)
NM(19.12.2006)

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